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3 **UNITED STATES DISTRICT COURT**  
4 **NORTHERN DISTRICT OF CALIFORNIA**  
5 **SAN JOSE DIVISION**  
6

7 MATTHEW RAY FREEMAN,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL,

11 Defendant.  
12

Case No. 5:17-cv-02279-BLF

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF  
MAGISTRATE JUDGE WESTMORE  
TO DISMISS CASE WITHOUT  
PREJUDICE**

[Re: ECF 19]

13 On July 19, 2018, Magistrate Judge Kandis A. Westmore in her Report and  
14 Recommendation (“R&R”) determined that the case should be dismissed without prejudice for  
15 Plaintiff Matthew Ray Freeman’s (“Plaintiff”) failure to prosecute. *See* ECF 19. Plaintiff did not  
16 file any objections.

17 When a party does not object to an R&R, the Court reviews it for clear error or manifest  
18 injustice. *See* Fed. R. Civ. P. 72(b); Fed. R. Civ. P. 72, Advisory Committee Notes (1983). After  
19 conducting an appropriate review, the Court may “accept, reject, or modify, in whole or in part,  
20 the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). The  
21 Court has reviewed and thoroughly considered Magistrate Judge Westmore’s R&R.

22 Federal courts have the “inherent power” to dismiss cases sua sponte for lack of  
23 prosecution. *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). When considering whether to  
24 dismiss a case for lack of prosecution, the court must weigh five factors: (1) “the court’s need to  
25 manage its docket,” (2) “the public interest in expeditious resolution of litigation,” (3) “the risk of  
26 prejudice to the defendants,” (4) “the policy favoring disposition of cases on their merits,” and (5)  
27 “the availability of less drastic sanctions.” *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984). In  
28 *Ash*, the Ninth Circuit affirmed the district court’s dismissal without prejudice for failure to

1 prosecute where the plaintiff had failed to act for a mere six weeks. *Id.* at 496. The Ninth Circuit  
2 emphasized both that dismissal without prejudice would give “the plaintiff the opportunity to  
3 return and prosecute his claims another day” and that the district court had “notified [the plaintiff]  
4 of the impending dismissal and given an opportunity” to explain the delay, to which plaintiff had  
5 failed to respond. *Id.* at 496–97. *Accord Rochester v. Rowe*, 471 F. Appx. 642 (9th Cir. 2012).

6 Here, as in *Ash*, the five factors weigh in favor of dismissing this case without prejudice  
7 for Plaintiff’s failure to prosecute. Plaintiff has yet to file a motion for summary judgment or  
8 motion to remand, though his original deadline to do so was January 11, 2018—almost seven  
9 months ago. *See* ECF 19. Moreover, Magistrate Judge Westmore provided Plaintiff sufficient  
10 notice of the possibility of dismissal, mentioning this potential outcome in both of her subsequent  
11 orders to show cause. *See* ECF 17; ECF 18. To date, Plaintiff has provided no justification for  
12 these delays. Finally, this dismissal is without prejudice, thus minimizing the chance that Plaintiff  
13 will be unable to prosecute his claims.

14 Finding the R&R correct, well-reasoned, and thorough, the Court adopts it in every  
15 respect. 28 U.S.C. § 636(b). Accordingly, the case is DISMISSED without prejudice for  
16 Plaintiff’s failure to prosecute.

17  
18 **IT IS SO ORDERED.**

19  
20 Dated: August 9, 2018



BETH LABSON FREEMAN  
United States District Judge